

## Attachment I - Legal Framework Summary

The city's consideration of a wireless facility project is governed by Belmont Zoning Ordinance Section 25.7; however, the federal Middle Class Tax Relief and Jobs Creation Act of 2012 (47 USCS § 6409), the federal Telecommunications Act (47 USCS § 332), regulations adopted by the Federal Communications Commission (FCC) (47 CFR §§1 et seq.), state law governing public utilities, and court decisions applying these laws preempt the City's Ordinance. The key state and federal laws that preempt the City's Wireless Telecommunications Ordinance are summarized below. Links are provided to the applicable government code sections.

### Federal Preemptions

- *Telecommunications Act of 1996 (47 USC §332)*

The Telecommunications Act, codified as 47 United States Code Section (USCS) 332, limits the City from either conditioning or denying projects based on concerns stemming from the environmental effects of radio frequency emissions ("RF"), if the proposed facility complies with federal RF standards. The Act also prohibits the city from denying projects if the applicant has shown that both: 1) The facility is necessary to fill a significant gap in the Applicant's wireless network; and 2) The facility is the least intrusive means of filling the service gap. [U.S. Code Title 47—Telecommunications](#)

- *Middle Class Tax Relief and Jobs Creation Act of 2012 (47 USC § 6409)*

The Middle Class Tax Relief and Jobs Creation Act of 2012, codified as 47 USCS 6409, provides that the city must approve a request to modify an eligible wireless facility if the proposed modification does not result in a substantial change to the physical dimensions of an existing tower or base station (i.e. a wireless facility). Under the Act, an eligible facilities request means any request for modification of an existing wireless facility that involves collocation of new transmission equipment, removal of transmission equipment, or replacement of transmission equipment. [U.S. Code § 1455.Wireless facilities deployment](#)

- *47 CFR § 1.40001 Wireless Facility Modifications - 2015*

The Federal Communications Commission (FCC) adopted new regulations, that broadly interpreted Section 6409 of the Act in favor of advancing wireless facility deployment. The new FCC rules define and expand on the terms used in the Act for what constitutes a "substantial change" to an existing facility. Under these rules, modifications "substantially change" an existing facility if the modifications will do one or more of the following:

1. Increase the height more than:
  - (a) 10% or one additional antenna array not more than 20 feet (whichever is greater) higher for towers on private property, or
  - (b) 10% or 10 feet (whichever is greater) for towers in the public rights-of-way and all base stations;

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2. Increase the width more than:
  - (a) 20 feet or the tower width at the level of the appurtenance (whichever is greater) for towers on private property, or
  - (b) six feet for towers in the public rights-of-way and all base stations;
3. Install more than four (4) equipment cabinets;
4. Involve any excavation outside either:
  - (a) the lease or license area on private property, or
  - (b) the “proximity” to the ground-mounted equipment in the ROW;
5. Defeat the existing concealment elements of the tower or base station; or
6. Violate a prior condition of approval that does not conflict with FCC standards for a “substantial change” under 1-5 above.

FCC regulations define other terms in the Act as follows. “Base station” means “the equipment and non-tower supporting structure at a fixed location that enable Commission-licensed or authorized wireless communications between user equipment and a communications network”, which is basically the transmission equipment itself and any non-wireless tower structure that supports transmission equipment under a valid permit for a wireless use. “Tower” means “any structure built for the sole or primary purpose of supporting any Commission-licensed or authorized antennas and their associated facilities”, which includes wireless telecommunication facilities. “Transmission equipment” means “any equipment that facilitates transmission for any Commission-licensed or authorized wireless communication service, including, but not limited to, radio transceivers, antennas and other relevant equipment associated with and necessary to their operation, including coaxial or fiber-optic cable, and regular and backup power supply.”

[FCC Order - 6409 - 2015](#)

- *Federal Communications Commission (FCC) Declaratory Ruling - 2018*

The Federal Communications Commission (FCC) adopted a Declaratory Ruling and Third Report Order in 2018, which sets forth limitations on state and local government regulation of small wireless facilities that are placed on existing or new utility poles and streetlight standards located in the public right-of-way, and private property. The FCC ruling: a) limits the level of local permitting and discretion; b) establishes “shot clock” rules (e.g., time limits and deadlines) for processing and action on local permits; c) limits the fees that can be charged for the facilities; and d) requires that fees required for processing of small wireless facilities be published in advance.

[\(FCC\) Declaratory Ruling - 2018](#)

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- *Federal Communications Commission (FCC) Declaratory Ruling - 2020*

The Federal Communications Commission (FCC) adopted a Declaratory Ruling in 2020, which further reduces the City's discretion for expansion of any cell site under 6409(a), as follows:

1. The FCC has limited the definition of substantial change allowing a greater increase in size and height to existing towers or antenna locations with little to no City ability to deny it.
2. The shot clock for these additions remains at 60 days; however, this latest ruling allows the applicant to define when the application has been filed. As long as the applicant files some materials and provides the reasons why 6409(a) applies, then the clock starts running.
3. Equipment Cabinets: The order lessened the restrictions on new cabinets, and narrowed the definition exempting anything on the pole itself.
4. Concealment elements: Concealment is not directly defined in Section 6409(a). The Section describes concealment within the context of substantial change. If the application results in a substantial change to a project, then a locality may deny it. If a concealment element is completely defeated, then it can be a substantial change to the project.

The FCC Declaratory Ruling (WT Docket No. 19-250) dramatically narrows the ability of localities to reject a project for eliminating a concealment element, by clarifying the definition of "Concealment Element", and "Defeat Concealment" as provided below.

*"Clarification of "Concealment Element. We clarify that concealment elements are elements of a stealth-designed facility intended to make the facility look like something other than a wireless tower or base station."*

*Clarification of "Defeat Concealment. Next, we clarify that, to "defeat concealment," the proposed modification must cause a reasonable person to view the structure's intended stealth design as no longer effective after the modification. In other words, if the stealth design features would continue effectively to make the structure appear not to be a wireless facility, then the modification would not defeat concealment. Our definition is consistent with dictionary definitions and common usage of the term "defeat" and is supported by the record. Our clarification is necessary because, as industry commenters point out, some localities construe even small changes to "defeat" concealment, which delays deployment, extends the review processes for modifications to existing facilities, and frustrates the intent behind section 6409(a)."*

The FCC order modifies the definition of concealment for 6409 applications, such that it is more consistent with the common definition for camouflage. The order then clarifies defeat of the concealment element (consistent with the previous clarification). As a result, the FCC order mandates that only enlargements that defeat some previously approved disguise of a facility (e.g. fake flag pole or tree) are considered to be a defeat of concealment. Defeat of features that partially or fully prevent a facility from being viewed (i.e., a parapet wall or line of trees) are not considered to be a defeat of concealment. [FCC Declaratory Ruling - June 10, 2020](#)

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- *Ninth Circuit Court Ruling - 2020*

City of Portland v. Federal Communications Commission (Case No. 18-72689). The Ninth Circuit issued its decision in a case brought by numerous cities challenging three FCC orders for the installation of small cell wireless facilities. The Court mostly ruled in favor of the FCC. One key exception was the Small Cell Order provision dealing with the authority of local governments in the area of aesthetic regulations. The panel held that to the extent that provision required small cell facilities to be treated in the same manner as other types of communications services, the regulation was contrary to the congressional directive that allowed different regulatory treatment among types of providers, so long as such treatment did not “unreasonably discriminate among providers of functionally equivalent services.” 47 U.S.C. § 332(c)(7)(B)(i)(I). The panel also held that the FCC’s requirement that all aesthetic criteria must be “objective” lacked a reasoned explanation. [City of Portland v. FCC \(Case No. 18-72689\)](#).

### State Preemption

- *Public Utility Code Section 7901*

Under California Public Utility Code (PUC) Section 7901, telephone companies have a right to construct telephone equipment in the public rights of way in such a manner as to “not incommode the public use” of the right of way. The courts have determined that wireless communication carriers are “telephone companies” for purposes of Section 7901. Cities have the right under PUC Section 7901.1 “to exercise reasonable control as to the time, place and manner” in which the right of way is accessed. This right of control includes the regulation of the placement and appearance of telecommunication facilities installed in the public right of way. Aesthetic and other concerns must be supported by substantial evidence in the record.

[Public Utility Code Section 7901](#) .

- *California Government Code Section 50030*

Any permit fee imposed by a city, including a chartered city, a county, or a city and county, for the placement, installation, repair, or upgrading of telecommunications facilities such as lines, poles, or antennas by a telephone corporation that has obtained all required authorizations to provide telecommunications services from the Public Utilities Commission and the Federal Communications Commission, shall not exceed the reasonable costs of providing the service for which the fee is charged and shall not be levied for general revenue purposes.

(Amended by Stats. 1997, Ch. 17, Sec. 56. Effective January 1, 1998.) [California Government Code 50030](#)

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- *California Government Code Section 65964.1*

(a) A collocation or siting application for a wireless telecommunications facility, as defined in Section 65850.6, shall be deemed approved if all of the following occur:

(1) The city or county fails to approve or disapprove the application within a reasonable period of time in accordance with the time periods and procedures established by applicable FCC decisions. The reasonable period of time may be tolled to accommodate timely requests for information required to complete the application or may be extended by mutual agreement between the applicant and the local government, consistent with applicable FCC decisions.

(2) The applicant has provided all public notices regarding the application that the applicant is required to provide under applicable laws consistent with the public notice requirements for the application.

(3) (A) The applicant has provided notice to the city or county that the reasonable time period has lapsed and that the application is deemed approved pursuant to this section.

(B) Within 30 days of the notice provided pursuant to subparagraph (A), the city or county may seek judicial review of the operation of this section on the application.

(b) This section does not apply to eligible facilities requests.

(c) The Legislature finds and declares that a wireless telecommunications facility has a significant economic impact in California and is not a municipal affair as that term is used in Section 5 of Article XI of the California Constitution, but is a matter of statewide concern.

(d) As used in this section, the following terms have the following meanings:

(1) “Applicable FCC decisions” means *In re Petition for Declaratory Ruling*, 24 FCC Rcd. 13994 (2009) and *In the Matter of Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, Report and Order, 29 FCC Rcd. 12865 (2014).

(2) “Eligible facilities request” has the same meaning as in Section 1455 of Title 47 of the United States Code.

(e) Except as provided in subdivision (a), nothing in this section limits or affects the authority of a city or county over decisions regarding the placement, construction, and modification of a wireless telecommunications facility.

(f) Due to the unique duties and infrastructure requirements for the swift and effective deployment of firefighters, this section does not apply to a collocation or siting application for a wireless telecommunications facility where the project is proposed for placement on fire department facilities.

*(Added by Stats. 2015, Ch. 685, Sec. 1. (AB 57) Effective January 1, 2016.)*

[California Government Code Section 65964.1](#)